

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	NO. 55997-4-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
MICHAEL YOHANNES,	)	Unpublished Opinion
	)	
Appellant.	)	FILED: July 17, 2006
	)	

**COLEMAN, J.**—Michael Yohannes was convicted of rape in the second degree. During trial, his counsel decided to allow testimony about Yohannes’s prior drug offense. Yohannes makes an ineffective assistance of counsel challenge. He further challenges the decision of the superior court not to allow a continuance of the trial so that he could obtain new counsel. He also argues that a State’s witness gave improper opinion testimony on the issue of guilt, that his counsel violated a duty of loyalty during the closing argument, and that the court erred in declining to suppress a statement he made prior to trial.

Because no legitimate tactic existed for allowing evidence of Yohannes's prior drug offense, counsel's performance was deficient. Furthermore, the error was prejudicial, as it corroborated testimony by State witnesses and undermined Yohannes's credibility. The ineffective assistance of counsel challenge is dispositive, and we do not reach Yohannes's other arguments. We reverse the judgment and sentence and remand for a new trial.

### **FACTS**

Michael Yohannes was charged with rape in the second degree and, in the alternative, with rape in the third degree. At trial, the court heard testimony that Yohannes, Richard Kabassu, and Mohammed Ahmed went to the August 2003 Bumbershoot music festival at the Seattle Center, where they approached 17-year-old AC, and AC's friend, 18-year-old GS. AC and GS testified that Yohannes and his two acquaintances persistently followed them over the next four or five hours. They testified that Yohannes and his two friends intimidated them by aggressively touching them and by singing violent rap lyrics. They additionally testified that they wanted to get away from Yohannes and his two acquaintances and that they tried to simply walk away, but that Yohannes and the two others would not desist.

AC and GS further testified that the aggressive behavior of Yohannes and his two companions escalated when they neared a fountain at the center. According to AC, Yohannes and Kabassu physically restrained her and engaged in sexual intercourse, including digital penetration by Yohannes, without her consent. A woman

walked by, saw them and said, “Oh, my God,” and passed on. A security guard walked up and said, “You guys are making people really uncomfortable, could you stop” and left. Verbatim Report of Proceedings (VRP) (Feb. 10, 2005) at 79. AC and GS did not seek help from either person. AC testified that she didn’t cry out for help to the woman in fear of violence to GS or herself and that she became so terrified that she couldn’t even speak to the security guard. GS, who testified that she was similarly assaulted by Ahmed, corroborated AC’s account of events.

Kabassu, who previously pleaded guilty to rape in the third degree, appeared as a witness for the State. Kabassu testified that he believed the sexual intercourse was consensual because “she never disagreed” and because “she never like got upset about anything.” VRP (Feb. 15, 2005) at 26. He subsequently testified that, according to his statement on plea of guilty, AC clearly expressed a lack of consent.

The State called Seattle police detective Keith Savas as a witness. Savas had interviewed Yohannes about the alleged sexual contact while Yohannes was in custody in the Airway Heights Corrections Center near Spokane on an unrelated drug crime. Before the prosecutor called Savas to the stand, she alerted the court that the issue remained unsettled “how we will ask questions regarding the fact that Mr. Yohannes was in custody at the time he’s interviewed by the detective.” VRP (Feb. 15, 2005) at 115. Yohannes’s counsel stated that he probably would stipulate that Yohannes was incarcerated on a drug conviction.

THE COURT: In my last case, which was a murder case, there was a concerted effort by the state not to introduce any indication of incarceration status. And when the officers went to talk with that particular defendant, it never

came out.

[THE PROSECUTOR]: That would be my intention, not to do it that way.

THE COURT: If you want that issue before the jury, that's your call . . . . That's trial strategy. I'm not going to interfere with it. But most times this court is used to the State painfully sanitizing the circumstances under which somebody was questioned or interrogated by the police.

So if you are comfortable with that and you think you need a minute or two with detective Savas, we'll take that.

VRP (Feb. 15, 2005) at 116–17. But Yohannes's counsel decided to allow the detective to state that Yohannes was incarcerated for a drug conviction at the time he was questioned. Savas testified that he questioned Yohannes at Airway Heights, where Yohannes was serving a sentence for a drug conviction.

Yohannes testified in his own behalf. He stated that AC and GS agreed to stay with him and his two friends as a group and that AC seemed to enjoy herself. He also testified that AC did not consent to sexual intercourse with Kabassu, but that she did consent to intercourse with him.

Yohannes's counsel elicited from Yohannes that he was interviewed while in Airway Heights on a charge of possession of a controlled substance. Yohannes's counsel asked him whether he participated in the drug treatment program at Airway Heights. When Yohannes testified that he had, the prosecutor objected on the basis of a lack of relevance. The court sustained the objection. During cross-examination of Yohannes, the prosecutor clarified without objection that Yohannes was incarcerated for possession with intent to deliver cocaine.

The jury found Yohannes guilty of both rape in the second degree and rape in

the third degree. The court struck the third-degree rape conviction and sentenced Yohannes to a term of 175 months of confinement. He appeals.

### **ANALYSIS**

We analyze whether Yohannes's counsel rendered ineffective assistance when he agreed to testimony that Yohannes underwent police questioning while incarcerated on an unrelated drug offense. A defendant who claims ineffective assistance based on counsel's failure to challenge the admission of evidence "must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted." State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (internal citations omitted).

The State contends that legitimate tactics existed for the decision of Yohannes's counsel to allow testimony of Yohannes's drug conviction. It argues that the testimony helped to blunt the effect of drug allegations and helped to provide a possible explanation for Yohannes's failure to recognize a lack of consent for the more serious rape charge. The State also contends that testimony about Yohannes's participation in a drug treatment program enabled Yohannes's counsel to present him as a troubled but changed man.

The record does not support these arguments. The only drug allegations at trial

came from testimony by AC and GS that Yohannes's group proposed that AC and GS join them in smoking marijuana. Yohannes vehemently denied that he and his companions made this proposal. Testimony of Yohannes's drug conviction would have bolstered these allegations, not blunt them. Furthermore, Yohannes's counsel made no argument during trial that drug use by Yohannes impaired his ability to recognize a lack of consent.

In addition, the testimony about Yohannes's participation in a drug treatment program was inadmissible. The parties agree that an objection to this testimony would have been sustained. The State concedes that this evidence would not have been allowed under ER 609.<sup>1</sup> The court clearly communicated that it was prepared to "sanitiz[e]" the circumstances of Yohannes's incarceration. VRP (Feb. 15, 2005) at 117. We therefore cannot discern the purpose of Yohannes's counsel in allowing this testimony. Because evidence of a prior drug conviction is inherently damaging and prejudicial to a defendant, particularly in the context of this case, we conclude that no legitimate tactical or strategic reason existed for agreeing to this testimony. See State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

The State contends that Yohannes cannot demonstrate prejudice because the

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<sup>1</sup> ER 609(a) provides: "For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment."

overall case against Yohannes was strong. We disagree. The State acknowledged during oral arguments that this case was primarily a credibility dispute. Other than the issue of consent, few facts were in dispute.

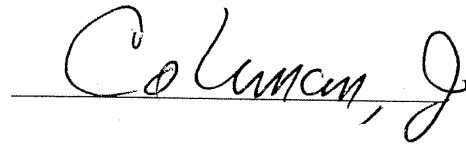
Furthermore, circumstantial evidence could be interpreted to support Yohannes's claim that the sexual intercourse was consensual. Kabassu's account was equivocal at best. A medical examination of AC did not detect physical trauma. The record shows that AC and GS did not seek help from others during the four or five hours they were followed by Yohannes and his two acquaintances. At one point, AC and GS went inside a women's restroom but did not use their cellular telephones to call for help. During the encounter near the fountain, they did not seek help from the woman or the security guard. The outcome of the case ultimately turned on whether jurors would believe the version of events presented by AC and GS or the version of events presented by Yohannes.

For this reason, testimony about Yohannes's prior conviction for possession with intent to distribute cocaine was prejudicial. A jury could easily interpret this evidence to mean that Yohannes was a person disposed to engage in crime. A prior felony conviction may be very prejudicial "as it may lead the jury to believe the defendant has a propensity to commit crimes." State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997).

In addition, testimony about Yohannes's prior conviction for possession with intent to distribute cocaine would have tended to corroborate the version of events

described by AC and GS, including the invitation by Yohannes's group to smoke marijuana. The testimony would have tended to undermine the account of events offered by Yohannes, who testified that he and his companions never discussed drugs. Because this case rested upon the credibility of AC, GS, and Yohannes, a reasonable probability exists that the outcome would have been different but for the evidence of Yohannes's prior drug conviction. See Saunders, 91 Wn. App. at 581.

Because Yohannes's trial counsel rendered ineffective assistance by allowing and soliciting information about Yohannes's prior conviction for possession with intent to distribute cocaine, we reverse and remand for a new trial.<sup>2</sup>

A handwritten signature in cursive script, reading "Columen, J.", written over a horizontal line.

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<sup>2</sup> Yohannes also argues that the superior court erred in denying his request for a continuance so that he could obtain new counsel. Prior to trial, Yohannes informed the court he wished to dismiss his trial counsel because he did not hire a private investigator, interview AC or other witnesses, and otherwise did not conduct a thorough investigation. The court engaged in a colloquy in which it informed Yohannes that attorneys in sexual assault cases often do not interview witnesses so that they can cross-examine them for the first time in front of a jury. We view this observation with skepticism. But because we reverse and remand on the basis of Yohannes's ineffective assistance of counsel challenge, we do not reach this issue. We also do not reach Yohannes's arguments that a State's witness gave improper opinion testimony on the issue of guilt and that his counsel violated a duty of loyalty during closing argument.

In a statement of additional grounds for review, Yohannes alleges that while he was incarcerated, Detective Savas forced him to give a statement by threatening to send him "to the hole" and that his statement therefore was not voluntary. The superior court heard testimony from Yohannes and Savas on this issue and concluded that Yohannes knowingly, voluntarily and intelligently waived his rights and that "[t]here is absolutely nothing to corroborate Mr. Yohannes's allegations . . . ." VRP (Feb. 7, 2005) at 117. Because the court was in the best position to evaluate the credibility of Yohannes and Savas, we reject his argument.



55997-4-1/9

WE CONCUR:

Dwyer, J.

Edenborn, J.